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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,

Appellant,

—v.—

DRUGGISTS MUTUAL INSURANCE COMPANY, and DICUS PRESCRIPTION DRUGS, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF EASTERN MISSOURI, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LEGAL DEFENSE FUND

RUTH BADER GINSBURG
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

LAUREN W. FIELD
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Attorneys for Amici Curiae

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BRIEF AMICUS CURIAE

of

American Civil Liberties Union, ACLU of Eastern Missouri, NOW Legal Defense and Education Fund, Women's Equity Action League, and Women's Legal Defense Fund.

INTEREST OF AMICI

Amici American Civil Liberties Union, ACLU of Eastern Missouri, NOW Legal Defense and Education Fund, Women's Equity Action League, and Women's Legal Defense Fund file this brief with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

Amici are organizations with a dedication to achieving equal justice under law for women and men. They share an abiding conviction that role-typing by sex is a severe and pervasive problem in society, and a firm commitment to work toward the elimination of gender-based discrimination.

This case presents the question whether a law carrying the "baggage of sexual stereotypes" can survive equal protection review, a law according employment-derived benefits more generously when a male wage earner dies than when a female wage earner dies. Amici regard this Court's response to the question as critical to recognition of the equal stature and dignity of female wage earners.

It is amici's position that the law at issue, to the extent it discriminates against men, does so only as a by-product of an offensive albeit traditional way of thinking about women -- as inferior to and therefore dependent on men.

The insidious side of gender-based classifications rooted in longstanding prejudices, yet rationalized as "compensatory," escaped the court below and merits cogent explication by this Court. Amici believe their brief will elucidate two points particularly: (1) purported favors to females as men's appendages downgrade women's status as workers and, in cumulative effect, dampen women's aspirations and limit their opportunities; (2) the sex bias evident in the law at issue and the opinion below indicate the need for explicit statement of doctrine implicit in the Court's recent decisions -- sex is a suspect criterion for official line-drawing.

Opinions Below

The opinion of the Missouri Supreme Court is reported at 583 S.W.2d 162 (1979). The opinion of the Circuit Court of Madison County, Missouri is not reported. Both opinions are set out in the Jurisdictional Statement at A-1 - A-25.

Jurisdiction

This action for workers' compensation death benefits draws in question the validity of 1976 Revised Statutes of Missouri Section 287.240 on the ground that the gender line the statute invokes is repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States. The statute denies benefits to a widower absent mental or physical incapacity or proof of his actual dependency upon his wife's wages for his support; it accords full benefits to a widow by conclusively presuming that she is totally dependent upon her husband's wages for her support.

On October 13, 1977, the Circuit Court of Madison County, Missouri held for appellant Wengler, ruling that the equal protection clauses of the Missouri and Federal Constitutions require death benefits for a man whose wife dies in a work-related accident on the same terms as Missouri provides for a woman whose husband dies in a work-related accident. On June 27, 1979, the Missouri Supreme Court reversed; the majority declared the gender classification valid and not repugnant to the Federal or State

Constitution.

A motion for rehearing, filed by appellant Wengler on July 6, 1979, was overruled by the Missouri Supreme Court on July 17, 1979. Notice of appeal to this Court was filed on July 19, 1979. The Jurisdictional Statement was filed on September 6, 1979, appellees filed a Motion to Dismiss on October 5, 1979, and probable jurisdiction was noted on October 29, 1979.

The jurisdiction of this Court to review the decision of the Supreme Court of Missouri on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: Stanton v. Stanton, 421 U.S. 7 (1975); Duren v. Missouri, 439 U.S. 357 (1979); Orr v. Orr, 440 U.S. 268 (1979).

Statute Involved

1976 Revised Statutes of Missouri Section 287.240 is set out in full in the Jurisdictional Statement at A-28 - A-31. In relevant part, the statute provides:

> . . .
>
> (2) The employer shall . . . pay to the . . . dependents of the employee a death benefit . . . .
>
> (4) The word "dependent" as used in this chapter shall be construed to mean a relative

by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; . . . .

Question Presented

Whether 1976 Revised Statutes of Missouri Section 287.240, which authorizes workers' compensation death benefits for the spouse of a male worker without regard to dependency, but conditions benefits for the spouse of a female worker upon mental or physical incapacity or proof of dependency, discriminates impermissibly on the basis of gender in violation of the equal protection clause of the fourteenth amendment to the Constitution.

Statement of the Case

Ruth Wengler, wife of appellant Paul J. Wengler, was killed in an accident while working for Appellee, Dicus Prescription Drugs, Inc. Appellant Paul J. Wengler made a claim for workers' compensation death benefits under 1976 Revised Statutes of Missouri Section 287.240. Prior to the July 21, 1977 hearing before the referee, widower Paul J. Wengler filed a memorandum of law contending that Section 287.240 violated the equal protection clauses of the Federal and State Constitutions; at the hearing, the referee noted that the constitutionality of Section 287.240 was at issue.

Under the Missouri law in question, a widower may not obtain periodic workers' compensation death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's wages. By contrast, the Missouri law conclusively presumes a widow totally dependent upon her husband's wages; she qualifies for periodic workers' compensation death benefits without regard to actual dependency. It was stipulated that appellant Paul J. Wengler was not actually dependent for support in whole or in part upon the wages of his wife at the time of her death nor was he mentally or physically impaired from wage earning.

On August 4, 1977, the referee denied benefits to appellant Wengler on the sole ground that he did not meet the sex-specific statutory requirement of incapacity or dependency. On review, the Missouri Labor and Industrial Relations Commission, on

September 9, 1977, adopted the referee's award and denied compensation. On October 13, 1977, the Circuit Court of Madison County, Missouri reversed. That Court held Section 287.240 denied Paul J. Wengler the equal protection of the laws in violation of the Missouri and Federal Constitutions because the statute authorizes death benefits for the surviving spouse of a male worker automatically but denies benefits for the surviving spouse of a female worker absent proof of the survivor's incapacity or dependency.

On June 27, 1979, the Missouri Supreme Court reversed the judgment of the Circuit Court of Madison County, Missouri. In a 5-1 decision, the Missouri Supreme Court upheld the gender line drawn by Section 287.240, mandating dissimilar treatment of workers and their spouses, solely on the basis of sex.

The Missouri Supreme Court majority acknowledged this Court's condemnation in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), of legislation based on "archaic and overbroad generalizations," such as "assumptions as to dependency," statutes "casting female wage earners in a light which denigrates their economic contributions to their families' support." 583 S.W.2d at 165, 167. It also acknowledged the inconsistency of its decision with those of the three state courts that have recently applied Wiesenfeld and Goldfarb to invalidate differential treatment of the spouses of male and female wage earners under workers' compensation statutes. Tomarchio v. Township of

Greenwich, 75 N.J. 62, 379 A.2d 848 (1977); Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 563 P.2d 849 (1977); Passante v. Walden Printing Co., 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). The Missouri Supreme Court majority found these decisions unimpressive; it characterized judgments of this Court and others "dealing with the same or similar matters" as "[i]n most instances" arriving at "self-serving conclusions." 583 S.W.2d at 167. Judge Seiler dissented; he pointed out that this Court, in clear and repeated rulings, "has rejected just such reasoning as that advanced by the majority in support of the result reached." 583 S.W.2d at 171.

Summary of Argument

I.

A familiar stereotype -- the dominant, independent man/the subordinate, dependent woman -- provides the basis for allocating workers' compensation death payments in Missouri. Compensation invariably is paid to the spouse when a male wage earner dies on the job; no compensation is paid for the female wage earner's work-related death unless the spouse is incapacitated or earns too little to sustain himself. This sex-biased arrangement denigrates the female worker's efforts and shrinks the fruit of her labors.

The equal protection principle cannot accommodate a plan that favors and rewards men's employment more than women's. This Court's decisions have explained repeatedly why and how schemes such as Missouri's hurt women. Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977). Among state courts that have considered the issue in the light of this Court's precedent, only Missouri's Supreme Court has failed to grasp that a law assigning more compensation for a man's work than for a woman's discriminates invidiously on the basis of gender. Freighted as it is with the "baggage of sexual streotypes," Missouri's plan offends the constitutional requirement that the state regulate workers' compensation with an even hand. Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 99 S. Ct. 2655 (1979).

II.

No close or even sensible relationship exists between the gender classification at issue and any relevant important governmental objective. Workers' compensation, the Missouri Supreme Court said, is "substitutional," it substitutes for common law remedies. But Missouri authorizes wrongful death recovery on a sex-neutral basis. The "substitutional" purpose is therefore frustrated, and in no way served, by the sex-biased compensation plan.

Nor is it tenably urged that a widow's need is the operative concept. The Missouri law responds not to the greater need of widows in comparison to widowers, but to the common law image of husband as supporter, wife, along with child, as dependent. Dependency presumed by law is the core notion, for Missouri's plan compensates alike the impoverished woman, the woman of independent wealth, the woman commanding a well-paid position.

The suggestion that the scheme helps women is perverse. Far from rectifying past discriminatory practices and attitudes toward women, the law in question effectively reduces the wage-benefit package of the female employee below that of an identically situated male employee. The "contributory" or "noncontributory" cast of the plan is irrelevant. Whether or not the employer is sole direct contributor, the female employee is paid less if the benefit package she brings home does not weigh fully as much as her male co-worker's.

Statistics to support the proposition that, in general, widows are dependent more often than widowers cannot salvage Missouri's sex-biased law. This Court's precedent solidly establishes that empirical support does not justify official policies reinforcing "the role-typing society has long imposed." Stanton v. Stanton, 421 U.S. 7, 15 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977). Patterning official policy to match familiar stereotypes of women and men casts the weight of government against those who would break the sex-typed mold. Such non-neutrality on the part of government rests on the mischievous assumption that the stereotype not only is, but will and ought to remain accurate.

On three occasions, this Court has upheld narrow, carefully-tailored provisions designed and operating to compensate women for economic disadvantages. None of those instances provides a shred of support for a law like Missouri's, which gives women, qua wage earners, less than a full count. Kahn v. Shevin, 416 U.S. 351 (1974), involving a small real property tax break for widows, did not relate in any way to employment. The tax exemption did not discount women's efforts in the marketplace, it did not rank the woman worker second. Schlesinger v. Ballard, 419 U.S. 498 (1975), and Califano v. Webster, 430 U.S. 313 (1977), to the extent they permit a boost to women as wage earners, stand squarely against Missouri's decision.

III.

Sex classification is handy and habitual, yet with rare exception it serves no purpose functional classification would not serve better. It has operated throughout the nation's history to "put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). "Past abusive discriminatory attitudes toward women," 583 S.W.2d at 167, will be projected far into the future unless official reliance on sexual stereotypes attracts the close review accorded other rankings that shore up and perpetuate society's longstanding prejudices -- classifications based on race, religion and national origin.

Despite this Court's skeptical and scrupulous review of laws rooted in old notions about women's and men's respective spheres, lower courts continue to regard the Court's pronouncements as unclear. The court below, for example, contrasted a "strict scrutiny" review standard with one using the words "substantial relationship," 583 S.W.2d at 167, and apparently equated the latter with cursory review. So long as the Court holds back clarion statement that the gender criterion is indeed "suspect," a procession of lower court dispositions, such as the one now before the Court, may be anticipated.

Since Reed v. Reed, 404 U.S. 71 (1971), this Court has reviewed a parade of cases challenging laws and official practices that pigeonhole people unfairly solely on the basis of their sex. The procession demonstrates that explicit designation of sex as a suspect criterion is overdue. Such designation provides the only wholly satisfactory starting point for addressing every remnant of the common law heritage that denied women independence and instead caused them to be covered, "clouded and overshadowed" by men.

ARGUMENT

I.

MISSOURI'S WORKERS' COMPENSATION DEATH BENEFIT SCHEME, DESIGNATING WIFE AS DEPENDENT, HUSBAND AS SUPPORTER, HEAPS ON THE WAGE-EARNING WOMAN AND HER SPOUSE THE "BAGGAGE OF SEXUAL STEREOTYPES"; LOADING THIS BAGGAGE ON WOMEN AND MEN VIOLATES THE EQUAL PROTECTION PRINCIPLE.

The statutory classification at issue assures compensation to the surviving spouse when a male wage earner dies. No compensation is afforded the surviving spouse when a female wage earner dies unless the survivor is incapacitated or has not earned enough to sustain himself. The working man's spouse recovers in full regardless of her own earnings and wealth. The working woman's spouse, by contrast, if he is not disabled from wage earning, recovers nothing beyond burial expenses unless he meets a stringent dependency test. However significant the wife's contributions to the family's income, indeed, even if she was the family's principal breadwinner, her spouse will go remediless so long as he has the means to support himself. See Dykes v. Thornton, 282 S.W.2d 451, 454 (Mo. 1955) (defining "dependent" as "not self-sustaining").

In short, Missouri allocates this death benefit derived from employment in accordance with a familiar stereotype. The male wage earner is officially designated a

worker who always counts.[1] His work-related death invariably results in compensation to his spouse. The female wage earner is assigned lower status. Her work-related death passes without compensation absent "substantial evidence" that her surviving spouse lacked resources necessary for his own maintenance. See Kemmerling v. Karl Koch Erecting Co., 338 Mo. 252, 256, 89 S.W.2d 674, 676 (1936) (as to person not presumed dependent "because of the relationship existing between the parties," no death

1/ A world of male workers, female surviving spouses, is suggested in annual reports filed under the law. See, e.g., Missouri Workmen's Compensation Commission, 15th Annual Report at 7 (1942), 16th Annual Report at 7 (1943), 17th Annual Report at 7-8 (1944):

> The Missouri Workmen's Compensation Commission has always kept in mind the beneficent aspect of the law, that is to furnish prompt and equitable compensation to injured employees, their widows and dependents . . . . (emphasis supplied)

The real world never conformed to the "workman and wife" model and today that image is distant from the life situations of most couples. Over 50% of women with husbands present and children under 18 are in the paid labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, Marital and Family Characteristics of the Labor Force, March 1978, table 5 (1978).

benefit is due absent "substantial evidence" of dependency); Dykes v. Thornton, supra.[2]

Classification of this genre is hardly new to this Court. Time and again in the past several years the Court has explained why the equal protection principle precludes legislation cast in an independent male/dependent female mold. Such gender-based differentiation, the Court has emphasized, assumes gainful employment as a domain in which men come first, women second, favors and rewards men's employment more than women's, underestimates women's contributions to family support and overestimates men's, shores up and perpetuates a view of women as less valued, more expendable workers than

2/ Missouri considers workers' compensation as "substitutional for" tort remedies in favor of the injured employee or his or her survivors. 583 S.W.2d at 164, 167; Motion to Dismiss at 6. In glaring contrast to the purported substitute, Missouri's wrongful death action provisions are gender-neutral. See 1976 Revised Statutes of Missouri 537.080 (placing husband and wife on an equal footing as persons entitled to recover for wrongful death). Elsewhere, the "substitute" matches the tort provision by treating husband and wife as equals in both contexts. See Cataldo v. Admiral Inn, Inc., 227 A.2d 199 (R.I. 1967).

men.[3/] See Frontiero v. Richardson, 411 U.S. 677 (1973) (providing wife of male service member with dependents' benefits but not husband of female service member absent proof wife supplied more than one-half of husband's support "heap[s] on" women wage earners additional economic disadvantages);

3/ For other Missouri law indications of long-held notions regarding wife's subordination to husband in economic endeavor, see 1976 Revised Statutes of Missouri 442.050 (woman can convey her real property by power of attorney only if she executes power jointly with her husband); Campbell v. Campbell, 281 S.W.2d 314, 317 (Mo. Ct. App. 1955) (husband may determine where marital unit will reside regardless of wife's desires); Easley v. Easley, 266 S.W.2d 28, 31 (Mo. Ct. App. 1954) (if wife refuses to abide by husband's choice of residence, she is stamped a deserter). Recent reform, however, suggests dawning appreciation of the unfairness of old ways. See 1976 Revised Statutes of Missouri Sections 452.315, 452.335, 452.355 (maintenance, costs and attorneys fees may be awarded to either spouse in divorce and separation proceedings); 1969 Revised Statutes of Missouri 293.060, repealed, Laws 1975, p. 310, § 1 (ending prohibition on women's employment in mining); 1969 Revised Statutes of Missouri 451.090, amended, Laws 1974, p. 975, § 1 (eliminating male/female 21/18 marriage age differential by setting 18 as age for both sexes); 1969 Revised Statutes of Missouri 564.680, repealed, Laws 1977, p. 659 § 1 (ending ban on work by girls under 18 as telegraph messengers).

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (provision of child-in-care social security benefit to deceased wage earner's widow, but not widower, denigrates the efforts of gainfully employed women); Califano v. Goldfarb, 430 U.S. 199 (1977) (equation of the terms "widow" and "dependent surviving spouse" in Social Security Act reflects a traditional way of thinking about females as inferior to males). See also Taylor v. Louisiana, 419 U.S. 522 (1975), followed in Duren v. Missouri, 439 U.S. 357 (1979) (rejecting once pervasive jury service exemptions based on women's "presumed role in the home"); Stanton v. Stanton, 421 U.S. 7 (1975) (rejecting once pervasive sex-based age of majority differential as a "self-serving" reflection of "the role-typing society has long imposed"); Craig v. Boren, 429 U.S. 190 (1976) (applying Stanton to sex-based age classification that discriminated against males); Schlesinger v. Ballard, 419 U.S. 498, 507, 508 (1975) ("overbroad generalizations" of female dependency are not tolerated under the Constitution); Califano v. Webster, 430 U.S. 313, 317 (1977) (a statutory scheme is not compatible with equal protection when it involves "casual assumptions that women are 'the weaker sex' . . . more likely to be . . . dependents").

Consolidating the decade's precedent, the Court emphasized last Term the insidious quality of legislation that pigeonholes men and women solely on the basis of sex. In Orr v. Orr, 440 U.S. 268 (1979), the Court held intolerable under the equal protection principle legislation permitting awards of alimony to women but not to men. Use of sex

to signal economic need "reinforce[s] stereotypes about the 'proper place' of women and their need for special protection," the Court observed. Because gender-based classifications bear the "inherent risk" of perpetuating sex-role stereotypes, even a purportedly compensatory law must be phrased in gender-neutral language or, if it draws a gender line, must be "carefully tailored" to avoid carrying with it the "baggage of sexual stereotypes." Id. at 283. Missouri's broad and casual assumption that wives are dependent, husbands, independent, hardly fits the description. The gender-based classification is not "carefully tailored." It is an oversized cloth not trimmed at all.

Similar analysis appears in Califano v. Westcott, 99 S. Ct. 2655 (1979), in which the Court ruled unanimously that according welfare benefits to families with unemployed fathers, but not to families with unemployed mothers, does not comport with equal protection. Women were purportedly favored by the legislation at issue in Orr, men by the law in question in Westcott. But both legislative products revealed, as does the law in the case at bar, the habitual assumption that the man is the family's breadwinner, while the woman's employment role, if any, is secondary. See 99 S. Ct. at 2662. No leeway is open to the legislature, the Court concluded, to proceed in reliance on the "baggage of sexual stereotypes." 99 S. Ct. at 2663 (citing Orr, at 283).

Even before this Court's decisions in Wiesenfeld and Goldfarb, supra, the clear trend in the states was toward elimination of gender-based differentials in workers'

compensation death benefits. See Note, Presumption of Dependence in Workers' Compensation Death Benefits As a Denial of Equal Protection, 9 U. Mich. J. L. Reform 138 (1975) (pointing out that under sex-biased statutes female employees effectively earn less in terms of dollar benefits for their families than do similarly situated male employees). After Wiesenfeld, New York's scheme, similar to Missouri's, was held invalid. Passante v. Walden Printing Co., 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). Declaring Wiesenfeld dispositive, the New York court stressed that the death benefit "derive[d] from employment itself rather than mere survivorship." 53 App. Div.2d at 11, 385 N.Y.S.2d at 180.[4/] Far from rectifying past discrimination against women, the court said, the sex-biased statute "gives support to a philosophy which minimizes the importance of employment for women, thus using past discrimination as a justification for continuing to burden them as a class with economic disadvantages." 53 App. Div.2d at

4/ Kahn v. Shevin, 416 U.S. 351 (1974), is therefore inapposite. According women qua wage earners a full count was not an issue as to the Florida real property tax legislation the Court upheld. See Tomarchio v. Township of Greenwich, 75 N.J. 62, 71, 379 A.2d 848, 852 (1977).

12, 385 N.Y.S.2d at 180.[5/]

After Goldfarb, the notion that laws like Missouri's were fair to men and favors to women became untenable. California's Supreme Court ruled that presuming wife, but not husband, dependent "potentially disadvantages large numbers of the very sex [the statute] purports to aid, and does so by perpetuating the paternalistic notion that a woman's financial contribution is unlikely to be of substantial importance to the family unit, [thus] the statute cannot be said . . . to rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

5/ In stark contrast to the law at issue here, a scheme which downgrades women as wage earners, the transitional legislation involved in Califano v. Webster, 430 U.S. 313 (1977), represented an effort to bolster the position of the wage-earning woman. Moreover, as the Court pointed out in Webster, laws guaranteeing equal treatment for women and men in all employment-related terms, conditions and benefits, not "romantically paternalistic" provisions, respond realistically and effectively to "past abusive discriminatory attitudes toward women." 583 S.W.2d at 167.

Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 407, 563 P.2d 849, 855-56 (1977). New Jersey's Supreme Court, in a particularly well-reasoned opinion, concluded:

> In the context of our workers' compensation scheme, the dependency provisions for widows were undoubtedly conceived as a remedial measure to help women overcome economic handicaps. They are based, however, on assumptions of female economic disablement which no longer enjoy currency. The net result of this stock approach is that a married woman's employment does not yield the same benefits which a married man's generates for his surviving spouse and family. Comparing men and women as employees, the ultimate effect of the dependency provisions upon a woman worker is to denigrate the worth of her efforts and shrink the fruit of her labors. From this vantage point, the statutory dependency scheme hurts rather than helps women.

Tomarchio v. Township of Greenwich, 75 N.J. 62, 73, 379 A.2d 848, 853 (1977).

Missouri's Supreme Court not only had Wiesenfeld and Goldfarb to guide it. Orr was decided well over three months before the Missouri Supreme Court issued its judgment. Westcott was decided some three weeks before Paul J. Wengler's motion for rehearing was overruled. No other jurisdiction has failed to follow the course repeatedly marked by this Court. Only Missouri continues to march to a different tune. Cf. Duren v. Missouri, 439 U.S. 357 (1979); Lee v. Missouri, 439 U.S. 461 (1979) (in continuing to invite "any woman" to refrain from jury service, Missouri failed to heed "principles enunciated in Taylor v. Louisiana, 419 U.S. 522 (1975)"). It is impossible to avoid the conclusion that in this case the Missouri motto "Show Me" has been pressed too far.

II.

THE GENDER-BASED MEANS EMPLOYED IN MISSOURI'S WORKERS' COMPENSATION DEATH BENEFIT SCHEME LACKS THE REQUISITE CLOSE RELATIONSHIP TO AN IMPORTANT GOVERNMENTAL OBJECTIVE; FAR FROM REMEDYING DISCRIMINATION WOMEN ENCOUNTER IN THE MARKETPLACE, THE CLASSIFICATION REINFORCES THAT DISCRIMINATION.

Summarizing the steady course of adjudication since 1971, the Court explained last Term:

> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination . . . . This Court's recent cases teach that such classification must bear a "close and substantial relationship to important governmental objectives" . . . .

Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282, 2293 (1979), quoting from Craig v. Boren, 429 U.S. 190, 197 (1976). The gender-based classification at issue utterly fails to meet that standard. It bears no sensible relationship whatever to objectives, real or hypothesized, identified by the court below.

The Missouri Supreme Court pointed first to the general purpose of the law, to substitute a secure compensation arrangement for uncertain tort remedies in favor of an injured worker or the worker's survivors. See 583 S.W.2d at 167. Second, the court below suggested that the legislature sought to assure prompt payment of death benefits to those with a perceived need; the legislature therefore invoked sex as an automatic indicator of need. 583 S.W.2d at 167-68.

With respect to the "substitutional" purpose of the law, the Missouri scheme is perverse. It substitutes for the sex neutrality of wrongful death recovery a sex-biased plan. And it effectively reduces the wage-benefit package of the female employee below that of an identically situated male employee.

Turning to sex as a proxy for need, the post hoc rationalization will not wash. The legislature plainly relied not on any need standard, but on the common law image of husband as supporter, wife as his dependent. The operative concept surely is dependency presumed by law, not need, for Missouri compensates alike the impoverished woman, the woman of independent wealth, the woman commanding a well-paid position.

A. The gender-based scheme frustrates the substitutional purpose of workers' compensation.

Missouri's workers' compensation law, in common with similar laws in other states, was designed "to substitute finite liability for the 'fortuities' of the available common law remedies." Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo. Ct. App. 1978). Common law remedies required a showing of fault, they were costly to pursue and subject to the law's delay. In return for a prompt and certain remedy for the loss occasioned by employment-related death or disability, the worker and the worker's spouse relinquished the right to pursue relief in tort against the employer. Todd v. Goosetree, 493 S.W.2d 411, 416 (Mo. Ct. App. 1973). See generally A. Millus & W. Gentile, Workers' Compensation Law and Insurance (1976).

But in substituting the compensation remedy and making it the exclusive means by which a spouse could recover death benefits from the employer, Missouri sex-typed the characters.

Missouri's wrongful death act has always been gender neutral.[6] Widows and widowers have the same right to sue and recover. Awards are not tied to a dependency standard.[7] Recovery is not limited to money the deceased would have supplied had she lived. See Hertz v. McDowell, 358 Mo. 383, 389-90, 214 S.W.2d 546, 549 (1948). Rather, the concept "pecuniary loss" encompasses tasks the deceased would have performed for, or services the deceased would have rendered to the surviving spouse. See, e.g., Bulkley v. Thompson, 240 Mo. App. 588, 602, 211 S.W. 2d 83, 92 (1948).

6/ See, e.g., Ann. Mo. Stat. § 537.080 (Vernon Supp. 1977) ("damages may be sued for and recovered (1) By the spouse . . . of the deceased"), amending Ann. Mo. Stat. § 537.070 (Vernon 1955) (damages "may be sued for and recovered: (1) By the husband or wife of the deceased").

7/ See, e.g., Ann. Mo. Stat. § 537.090 (Vernon Supp. 1977) (a spouse may recover "such damages as will fairly and justly compensate . . . for any damages he . . . sustained and [is] reasonably certain to sustain in the future as a direct result of such death"), amending Ann. Mo. Stat. § 537.090 (Vernon 1953) (juries may award the husband or wife "such damages . . . as they may deem fair and just, with reference to the necessary injury resulting from such death").

Whatever its other shortcomings, the tort remedy did recognize husbands and wives as individuals of equal standing. By contrast, Missouri's compensation substitute is in fact no substitute at all when a Ruth Wengler dies. But cf. Cataldo v. Admiral Inn Inc., 227 A.2d 199 (R.I. 1967). Rather, it is a flat denial of any payment from the employer to the surviving spouse.[8]

8/ Only a dwindling minority of states retain provisions kin to Missouri's. Most legislation has been adjusted to conform to current equal protection doctrine regarding sex classification. The federal workers' compensation law typifies the general pattern. 5 U.S.C. §§ 8101, 8133 (conclusive presumption of dependency -- in effect, a substantive rule that dependency in fact is irrelevant -- applies to widow and widower alike).

In Missouri, even a dependent widower might go remediless if it is found that he should not have been dependent. Cf. Ricks v. H.K. Porter, Inc., 439 S.W.2d 164 (Mo. 1969) (20 year old stepgrandson, though in fact supported by deceased wage earner, merited no compensation because he was capable of self-support); W. Malone, M. Plant & J. Little, The Employment Relation 427 (1974) (where adult female claims she is dependent, courts do not inquire into her ability to earn her own living; where adult male asserts dependency, courts inquire whether he could and should support himself).

B. Missouri's plan effectively reduces the wage-benefit package of the female employee below that of an identically situated male employee.

Beyond debate, workers' compensation is a benefit generated through a wage earners employment, a part of the employee's total compensation package. Tomarchio v. Township of Greenwich, 75 N.J. 62, 74, 379 A.2d 848, 853 (1977); see Oi, Workmen's Compensation & Industrial Safety, in I Supplemental Studies for the National Commission on State Workmen's Compensation Laws 41, 63, 66-67, 99-100 (1973). The bundle of benefits, apart from direct wage payments, constitutes a significant share of work-derived compensation. Accounting for approximately 17 percent of total compensation in 1968, id. at 67, 100, employment-related benefits amounted to 25 percent of employers' payroll costs in 1975. Note, Sex Discrimination in Employee Fringe Benefits, 17 Wm. & Mary L. Rev. 109 (1975). An employment-related benefit may entail direct contributions by both employer and employee or it may be funded by the employer alone. For example, some hospitalization and pension plans are funded by joint contributions, but it is becoming more common for employers to pay the entire cost of such programs. See Petermann, Fringe Benefits of Urban Workers, 94 Monthly Lab. Rev. 41, 43-44 (Nov. 1971).

Missouri's Supreme Court indulged the misguided notion that female employees are shortchanged because their spouses are not protected to the same extent as are spouses of male employees only when the benefit plan is contributory. 583 S.W.2d at 167. Where the employer is sole contributor, as in the case of workers' compensation,[9] then, according to the Missouri Supreme Court, it is proper to forget the female worker. Conveniently casting from sight the worker whose labor generates the benefit, the court below characterized the scheme as a favor to women. After all, widows are compensated, widowers are not.

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9 The notion that employees pay nothing for a "noncontributory" program is surely naive. See Gregory & Gisser, Theoretical Aspects of Workmen's Compensation, in I Supplemental Studies for the National Commission on State Workmen's Compensation Laws 107, 108 (1973) (economists are perplexed by the assumption in non-economic literature that, unless the employee "contributes," the incidence rests solely on the employer or is passed on to the consumer); Vroman, The Incidence of Compensation Insurance Premium Payments, in II Supplemental Studies for the National Commission on State Workmen's Compensation Laws 241 (1973) (labor bears most of the burden through the impact of the payments on their relative share of income in the economy).

But if it were appropriate to shroud the female worker when a benefit program covering employees' families is funded solely by the employer, then even the universally embraced equal pay concept would be substantially undermined. Some seven years ago, this Court, in an 8-1 judgment, firmly rejected the reasoning Missouri would revive. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court held unconstitutional noncontributory housing and health care fringe benefit programs covering the wives of military officers without regard to dependency, the husbands of military officers only if they proved they depended on their wives for their support.

In sum, the bright line the Missouri Supreme Court discerned between contributory and noncontributory programs is less than a will o' the wisp.10/ Whether or not the employer is sole direct contributor, the female employee is paid less if the benefit package she brings home does not weigh fully

10/ The line was seen as a means to distinguish Califano v. Goldfarb, 430 U.S. 199 (1977), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Others have understood those decisions better. Wiesenfeld and Goldfarb, together with Frontiero, broadly condemn "differential treatment depriving women of the family protection that men receive as a result of their employment." Tomarchio v. Township of Greenwich, 75 N.J. 62, 72, 379 A.2d 848, 852 (1977).

as much as her male co-worker's.11/

11/ The point is underscored in federal provisions banning gender-based discrimination in employment. E.g., 5 U.S.C. § 7202 stipulates that all regulations granting benefits to government employees

> (b) shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children.

Further, 5 U.S.C. § 7202 declares that

> (c) any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

Applicable to the private sector as well as to municipal and state employment, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., unquestionably has the same thrust. Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission (29 C.F.R. § 1604.9(d)) therefore provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees . . . .

C. Employment and marital relationship, not a woman's need, are the criteria relevant to Missouri's plan.

Although the statute at issue is "phrased in terms of dependency, not need,"[12] Missouri's Supreme Court has hypothesized "perceived need" as the basis for the gender line. 583 S.W.2d at 168. This Court has heard that recitation before. It echoes the attempt in Califano v. Goldfarb, 430 U.S. 199 (1977), to shield the classification there invalidated by attributing to it a wholly benign, compensatory purpose.[13]

12/ Califano v. Goldfarb, 430 U.S. at 213.

13/ With respect to gender-based classification, this Court has repeatedly cautioned: "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield" protecting legislation against close review. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

The cover spread here is as transparent as the one in Goldfarb. In both cases, the legislation established parity between wives and husbands who were not self-sustaining, but extended to financially secure wives a benefit withheld from financially secure husbands. See Califano v. Goldfarb, 430 U.S. at 221 (Stevens, J. concurring); cf. Orr v. Orr, 440 U.S. 268, 282 (1979). The sex-based distinction between self-sustaining wives and self-sustaining husbands makes no more sense now than it did three years ago.

In short, "nothing whatever suggests a reasoned . . . judgment [by the Missouri legislature] that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers." Califano v. Goldfarb, 430 U.S. at 214. The afterthought that the Missouri legislature deliberately set out "to remedy the arguably greater needs of the [widow]," is unconvincing. See id. at 217. The far more plausible explanation, there was "an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent." Ibid. Neither in design nor in operation is the provision a welfare benefit for the needy. Rather, the categorization is a typical, reflexive response to "archaic and overbroad" generalizations[14] about men as breadwinners and women as dependents. Enacted in an era when "those in positions of power accepted as

14/ Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

axiomatic" women's subordination to men,[15] the provision simply will not bear revisionist interpretation.

D. Statistics depicting women as primarily wives, only secondarily workers, supply no fair basis for sex-typing a workers' compensation law.

Statistics in support of a stereotype, appellees suppose (Motion to Dismiss at 5), salvage sex-biased laws. But this Court has made it plain that empirical support does not justify official policies perpetuating "the role-typing society has long imposed." Stanton v. Stanton, 421 U.S. 7, 15 (1975).

Statutory preference of men over women as estate administrators was invalidated although it could be documented that, in business affairs, men are more active than women. Reed v. Reed, 404 U.S. 71 (1971). A dependency test applicable to widowers but not widows was rejected in Califano v. Goldfarb, 430 U.S. 199 (1977), although statistics were pressed with vigor to establish that 78.5% of all married women, and 88.5% of those over fifty-five are dependent on their husbands. Id. at 238

15/ Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 404, 563 P.2d 849, 854 (1977). See note 3 supra.

n. 7 (Rehnquist, J., dissenting).[16] See also Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Frontiero v. Richardson, 411 U.S. 677, 681-82 (1973). For resort to generalizations about "the way women (or men) are," however amusing in Mozart opera,[17] is incompatible with "the normative philosophy that underlies the Equal Protection Clause." Craig v. Boren, 429 U.S. 190, 204 (1976) (text at n. 17). Patterning official policy to match familiar stereotypes casts the weight of government against those who would break the sex-typed mold. Such line-drawing has all the earmarks of self-fulfilling prophecy. It rests on the mischievous assumption that the stereotype not only is, but will and ought to remain accurate. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 725-26 (1971).

16/ It appears, however, that a significantly lower percentage of women would in fact rank as dependents under the rigid and stringent one-half support test the Social Security Act specified. See Brief for Appellee, Califano v. Goldfarb, at 30-34, 43-45.

17/ Cosi Fan Tutte.

As its very name announces, the law at issue compensates workers. There is special irony in labelling that law a "favor" to females when it operates to reduce the compensation a woman's labor attracts. Even when the law was new, it adversely affected significant numbers of women.18/ Today, the discount effect is a reality in the "typical" American family, for the two-earner couple has become a "well-established fact of American life." Bureau of Labor Statistics, U.S. Dep't of Labor, Women in the Labor Force: Some New Data Series, Report 575, at 4 (1979); see id. at 1 (by 1979, women over age 16 accounted for over 40% of the labor force and over 50% of all women over 16 worked).

In March 1978, 59.6% of all women ages 16-54 were in the paid labor force; for married women with husbands present, the participation rate was 55.4%. Smith, The Movement of Women into the Labor Force, in The Subtle Revolution 1, 9 (Urban Institute 1979) (source: Bureau of Labor Statistics, U.S. Dep't of Labor, unpublished tabulations

18/ The law originated in 1925. 583 S.W.2d at 164. Women 14 years of age and over constituted 20.4% of the labor force in 1920, and 21.9% in 1930; 22.7% of all women 14 and over worked in 1920, 23.6% in 1930. Employment Standards Administration, Women's Bureau, U.S. Dep't of Labor, 1975 Handbook on Women Workers, Bulletin 297, at 11.

from the March 1978 Current Population Survey). Three-quarters of the women in the labor force worked full time or were seeking full-time employment. Id. at 10. Women who work full time the year round contribute nearly 40% of family income. Hayghe, Working Wives' Contribution to Family Income in 1977, in U.S. Dep't of Labor, Monthly Labor Review 62, 64 (October 1979).19/

What does a law like Missouri's signal to women even when the majority of them are in the marketplace?20/ As worker, the compensation law instructs, woman counts second. This subordinate status reinforces a view long promoted in society. Despite her paid job, the woman is expected to carry a vastly disproportionate share of the homework, to support by her services the man whose job counts first. In this light, the notion that the Missouri scheme is a corrective for "past abusive discriminatory attitudes toward women," 583 S.W.2d at 167, defies reason.

19/ In dual earner families with incomes below $15,000, the wife's full-time earnings account for considerably more than 40%. The figures for 1975: families with incomes below $10,000, wife contributed 59.5%; families with incomes between $10,000 and $14,999, wife contributed 44.7%. Bureau of Labor Statistics, U.S. Dep't of Labor, U.S. Working Women: A Databook 38, Table 41 (1977).

20/ Relying on 1960's figures this Court used in Kahn v. Shevin, 416 U.S. 351 (1974), the court below incorrectly assumed the one (male) breadwinner family remains the dominant pattern. 583 S.W.2d at 165.

Rather, the law shores up the attitudes that impede women from seeking economic opportunity on an equal basis with men. See Barrett, Women in the Job Market: Occupations, Earnings and Career Opportunities, in The Subtle Revolution 31, 59 (Urban Institute 1979).

E. Any "favor" Missouri's scheme accords women as wives is offset by the disadvantage the plan heaps on women as wage earners.

On three occasions, this Court has upheld gender classifications on the ground that they operated solely to compensate women for past and present economic disadvantages. Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Califano v. Webster, 430 U.S. 313 (1977). Each was perceived as a case in which some women were helped and no women were harmed by the gender line at issue. Kahn involved no worker's compensation. The little real property tax break there at stake (a $15. saving at the then applicable tax rate) bore no relationship to employment. It did not discount women's efforts in the marketplace, it did not rank the woman worker

second.21/

Schlesinger v. Ballard arose in a setting in which discrimination against women ran wild. Barred by law from serving on ships at sea22/ and subjected to a variety of other restrictions,23/ a female officer in the Navy could hardly expect to rise to the top of the tree in a race with a male officer. This Court was asked to intercede at the one point in the rampantly sex-based system at which women arguably received a boost.24/ No litigant in that case sought the Court's review of the network of laws and regulations holding women back. Under the circumstances, the Court could not be expected to alter one small piece in a large, complex puzzle, a provision that happened to

21/ Moreover, Kahn is specifically and narrowly tied to the "large leeway" states historically have enjoyed in framing property tax legislation. 416 U.S. at 355. It would utterly pervert this Court's meaning to use Kahn as an excuse for any classification that, directly or indirectly, denigrates the position of woman as wage earner. See Tomarchio v. Township of Greenwich, 75 N.J. 62, 71, 379 A.2d 848, 852 (1977).

22/ The law barring assignment of women to ships was held unconstitutional by Judge Sirica in 1978, Owens v. Brown, 455 F.Supp. 291 (D.D.C.), and the Navy pursued no appeal.

23/ See generally M. Binkin & S. Bach, Women and the Military (Brookings Institution 1977).

24/ Male officers twice passed over for promotion were subject to mandatory discharge; female officers could remain in service for thirteen years before mandatory discharge for lack of promotion.

harm a man,[25] while leaving untouched the host of provisions that harmed women.

Califano v. Webster entailed a small step Congress took in 1956 to grapple with disadvantages encountered by women qua wage earners. Those disadvantages included depressed wages (unequal pay, in 1956, was the norm) and early retirement forced on women but not on men. Congress sought to limit projection of discriminatory job market conditions into the female worker's post-retirement years. Later, Congress addressed the problem directly. It mandated equal

25/ Lt. Ballard's case was idiosyncratic. His "mustang" status (he served as an enlisted man for seven years before becoming an officer) made a guaranteed thirteen-year officer tenure attractive to him; it would bring his total service to twenty years, thus assuring him a Navy pension. Many female officers, however, viewed the thirteen year tenure provision as operating in the typical case to the disadvantage of women. The normal period in which the male officer went "up or out" was nine years. If he went "out," he would get severance pay. But the female officer who wished to leave short of thirteen years would not be entitled to severance pay. Nor would thirteen years' service bring her within range of the twenty years needed for retirement on pension. Her male counterpart, out after nine years, would have the chance to start up the ladder, and accrue pension credits, in a new career four years earlier. For a female officer's effort to explain how she was harmed by the differential, see Two v. United States, 471 F.2d 287 (9th Cir. 1972), cert. denied, 412 U.S. 931 (1973).

pay[26] and nondiscrimination in hiring, firing and all terms and conditions of employment.[27] When Congress extended those measures to most sectors of the economy, it phased out the differential at issue in Webster. As this Court recognized, women wage earners were helped far more substantially by equal compensation and opportunity guarantees than they were by the transitional gender classification inspected in Webster.

In sum, Kahn v. Shevin provides not a shred of support for giving a female wage earner less than a full count. Schlesinger v. Ballard and Califano v. Webster, to the extent they permit a boost to women as wage earners, stand solidly against the Missouri decision.

26/ Equal Pay Act of 1963, 29 U.S.C. § 206(d).

27/ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq.

III.

THE PLAIN IMPORT OF THIS COURT'S PRECEDENT BEARS EXPRESS DECLARATION: SEX IS A SUSPECT CRITERION.

It was once this Court's view that women, like children, are indeed "persons" and may be "citizens" within the meaning of the fourteenth amendment, but that women, again like children, are appropriately placed in compartments separate from men. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 168 (1874).28/ Missouri's workers' compensation death benefit arrangement, enacted in an era when that habit of thought held sway,29/ reflects the once standard branding: wives, together with children under the age of eighteen, rank as "dependent"; husbands count as self-standing family heads, supporting but rarely dependent on the family unit. 1976 Revised Statutes of Missouri Section 287.240 (4)(a), (b).

28/ See generally Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law 1-108 (1975); Davidson, Ginsburg & Kay, Sex-Based Discrimination 2-59 (1974).

29/ See note 3 supra. The relevant statutory provisions remain substantially as initially adopted by Missouri's legislature in 1925. 583 S.W.2d at 164. Over two decades later, it was still the view that the Constitution compelled recognition of the woman citizen's equal stature and dignity in only one particular -- the grant of the franchise by the nineteenth amendment. Fay v. New York, 332 U.S. 261, 290 (1947).

In keeping with the habit of thought that has so long operated to restrict women's options and confine their opportunities, Missouri's Supreme Court described the explicit gender line here at issue as favoring the sex traditionally marked "fairer," "weaker," or "second." See 583 S.W.2d at 167-68. But cf. S. de Beauvoir, Second Sex (1949).30/ But in a series of decisions spanning the decade, this Court has removed the judicial blinders: it has recognized that old accepted rules and customs purportedly favoring women do so only in conjunction with a view of them as men's appendages. See, e.g., Califano v. Goldfarb, 430 U.S. 199, 222-24 (1977) (Stevens, J., concurring). The "favor" Missouri paternalistically accords woman as wife comes at an exorbitant price -- as wage earner woman is disfavored, shortchanged, not automatically ranked in common with her brother as "breadwinner," "supporter," "provider."

Under the invigorated review standard evolved by this Court,31/ overt sex

30/ For early identification of the defective vision that led "men of the legal profession" to regard sex-based discrimination as "protection" or "favor" for women, see Matthews, Women Should Have Equal Rights with Men: A Reply, 12 A.B.A.J. 117, 120 (1926); Crozier, Constitutionality of Discrimination Based on Sex, 15 B. U. L. Rev. 723 (1935). More recent commentary includes Ginsburg, Gender and the Constitution, 44 U. Cin. L. Rev. 1 (1975).

31/ See Karst, Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 54 (1977); The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 177-88 (1977).

classifications have been invalidated in a variety of contexts, from estate administration (Reed v. Reed, 404 U.S. 71 (1971)) to social welfare measures. Califano v. Westcott, 99 S. Ct. 2655 (1979). Refusing to review these classifications through a rose-colored lens, the Court has at last seen what many women and men have struggled to reveal for generations.32/ Throughout the nation's history sex has been "the touchstone for pervasive and often subtle discrimination," hence official resort to an explicit gender criterion should be reviewed skeptically and scrupulously, it should not survive constitutional challenge absent "an exceedingly persuasive justification." See Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282, 2293 (1979). "[T]he historic legal and political discrimination against women," the Court now appreciates, has been "severe" and readily maintained because sex, like race, is an "obvious badge." Mathews v. Lucas, 427 U.S. 495, 506 (1976).33/ Absent heightened judicial

32/ See generally W. Chafe, The American Woman (1972); E. Flexner, Century of Struggle (rev. ed. 1975); E. Janeway, Man's World, Woman's Place (1971); L. Kanowitz, Women and the Law (1969); A. Kraditor, ed., Up From the Pedestal (1968); J. S. Mill, Subjection of Women (1869).

33/ The marked tendency "in America to trace two clearly distinct lines of action for the two sexes" has been apparent even to observers from abroad. See A. de Tocqueville, Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classic Series, Galaxy ed. at 400 (1947); cf. G. Myrdal, An American Dilemma 1073 (2d ed. 1962).

sensitivity to gender-based classifications, the risk is high, as the instant case reveals, that legislation distinguishing between men and women based on "habit, rather than analysis or actual reflection," will continue to clutter the law books of nation and state.34/ See Califano v. Goldfarb, 430 U.S. 199, 222 (1977) (Stevens, J., concurring).

While this Court has repeated the instruction that explicit sex classification must fall when freighted with the "baggage of sexual stereotypes," Orr v. Orr, 440 U.S. 268, 283 (1979), including gender-based "assumptions as to dependency," Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975),35/ lower courts36/ and defenders of discrimination view the Court's pronouncements as unclear. The case at bar is illustrative.

34/ See generally Report of the U.S. Comm'n on Civil Rights, Sex Bias in the U.S. Code (1977); B. Brown, A. Freedman, H. Katz & A. Price, Women's Rights and the Law (1977).

35/ Accord, Califano v. Goldfarb, 430 U.S. 199, 206-207 (1977).

36/ Cf. Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 400, 563 P.2d 849, 851 (1977) (describing as "not entirely clear" this Court's post-1971 direction regarding gender-based classification). But cf. The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 130, 133-35 (1979) (asserting that Orr and Westcott provide clearer guidance than did earlier decisions).

Judge Donnelly, concurring in the result below, maintained this Court's decisions signal a green light for any position one might take. Hence, he concluded, there is "no identifiable 'supreme Law of the Land' . . . by which [lower courts] may adjudicate a claim of alleged gender-based discrimination." 583 S.W.2d at 168. Accordingly, he continued, state law is dispositive and, in Missouri, "gender-based discriminations are held to be matters for legislative determination that cannot be considered by the court." Id. at 169. Appellees, Ruth Wengler's employer and its insurer, have urged the Court that utmost deference is due to the legislature's preference for lump categorization by gender over functional, sex-neutral classification. Motion to Dismiss at 9. The majority below regarded as relevant precedent Weinberger v. Salfi, 422 U.S. 749 (1975), in which the Court emphasized the wide leeway generally open to legislatures in framing social legislation. 583 S.W.2d at 166. Missouri's Supreme Court contrasted a "strict scrutiny" standard with one based on "substantial relationship," and apparently equated the latter with cursory review. Id. at 167.

But careful attention to this Court's decisions reveals the distinction that has eluded appellees and the court below. In the generality of cases, as Salfi holds, broad latitude for legislative line-drawing is the rule. The Court has confirmed this position in several recent adjudications. See Califano v. Boles, 99 S. Ct. 2767 (1979); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. DeCastro, 429 U.S. 181 (1976);

Mathews v. Lucas, 427 U.S. 495 (1976). One has only to compare this string of decisions with Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), Califano v. Goldfarb, 430 U.S. 199 (1977), and Califano v. Westcott, 99 S. Ct. 2655 (1979), to grasp the point. Sex-based classification is handy and habitual though it serves no interest functional classification could not more effectively and evenly serve. Traditionally, sex classification has operated to "put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion). "Past abusive discriminatory attitudes toward women," 583 S.W.2d at 167, will be projected far into the future unless official reliance on sexual stereotypes attracts the close review accorded other rankings that shore up and perpetuate society's longstanding prejudices -- classifications based on race, religion and national origin.

Commentators, reflecting particularly on last Term's decisions in Orr and Westcott, supra, have concluded that, while the Court has not yet officially stamped sex classifications "suspect," all is in place save the seal. See The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 130, 135 & n. 35 (1979). But so long as the Court holds back clarion statement that the gender criterion is indeed "suspect," a procession of lower court dispositions, such as the one now before the Court, may be anticipated. Cf. Duren v. Missouri, 439 U.S. 357 (1979).

In sum, substantial confusion among lower courts persists as to the standard of review appropriate to gender-based classifications. Over seven years ago, when Frontiero v. Richardson was before the Court, the insidious side of virtually every gender classification, even those traditionally rationalized as "benign," was illuminated. See Brief of American Civil Liberties Union, Amicus Curiae and Joint Reply Brief of Appellants and American Civil Liberties Union, Frontiero, supra. The parade of cases since Frontiero challenging legislation rooted in "old notions" and "overbroad generalizations" about women and men[37] should leave no doubt on the point urged at the start of the 1970s: designation of sex as a suspect criterion is overdue, it provides the only wholly satisfactory standard for dealing with the claim in this case, and it should be the starting point for addressing

37/ See, e.g., Stanton v. Stanton, 421 U.S. 7 (1975) (sex-based age differential); Craig v. Boren, 429 U.S. 190 (1976) (sex-based age differential again); Taylor v. Louisiana, 419 U.S. 522 (1975) (automatic exemption of women from jury service); Duren v. Missouri, 439 U.S. 357 (1979) (automatic exemption of women from jury service again).

every remnant of the common law heritage that denied women independence and instead caused them to be "clouded and overshadowed" by men.[38]

38/ The Lawes Resolution of Women's Rights (London 1632), quoted in E. Flexner, Century of Struggle 7-8 (rev. ed. 1975); 1 W. Blackstone, Commentaries* 442; cf. Sayre, Property Rights of Husband and Wife, 7 Marr. & Family Living 17-18 (1944). 1976 Revised Statutes of Missouri Section 287.240(4)(a) plainly reflects the common law baggage once explained as disabling women only to protect and benefit them, thus rendering the female sex "so great a favourite . . . of the laws of England." 1 W. Blackstone Commentaries* 445.

CONCLUSION

The work-related benefit here at issue, tied as it is to the independent man/dependent woman model, inevitably stamps males as the wage earners who count first and in full, females as secondary workers who merit less than a full count. No effective amelioration of women's economic position is possible until that model is replaced by one neutrally based on the economic and social interdependence of wife and husband.

For the reasons stated above, the decision of the Missouri Supreme Court should be reversed, and 1976 Revised Statutes of Missouri Section 287.240 should be declared unconstitutional insofar as it differentiates between the surviving spouses of deceased workers solely on the basis of gender.

On remand, the court below may fully preserve the death benefit for a worker's widow by declaring the benefit equally

applicable to a worker's widower.[39/]

Respectfully submitted.

RUTH BADER GINSBURG
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

LAUREN W. FIELD
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Attorneys for Amici Curiae*

39/ Death benefits entail a relatively insignificant cost. In 1974, for example, the last year in which Missouri separately stated the sex of employees killed on the job, females accounted for 9 of the 127 deaths; benefits paid out for all 127 deaths were $119,844.71, in contrast to pay outs for all injuries, including deaths, of $21,553,664.58. Missouri Division of Workmen's Compensation, 48th Annual Report at 17, 19, 25 (1975). In 1976, death payments were $274,781.06, total workers' compensation payments, $21,426,866.17 Missouri Dep't of Labor and Industrial Relations, Annual Report Fiscal Year 1977 at 21. For 1977, the figures are $263,211.19 for death benefits, $25,534,986.55 for all workers' compensation payments. Missouri Dep't of Labor and Industrial Relations, Annual Report Fiscal Year 1978 at 22. The national experience is similar. See Report of the National Commission on State Workmen's Compensation Laws 71 (1972) (work-related deaths account for less than 1% of all workers' compensation claims and less than 10% of all benefits).

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